



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

Ecology Division

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August 6, 1999

Mr. Jackson C. Fox  
Regional Counsel  
EPA Region X  
1200 Sixth Avenue  
MS ORC-158  
Seattle, WA 98101

RE: State Enforcement of Water Quality Standards

Dear Mr. Fox:

You have requested an explanation from this office regarding the state's position on the following question:

Does the State of Washington have authority under state law to enforce violations of state water quality standards at non-federal dams located within the state outside the context of an NPDES permit or section 401 certification?

You have requested this explanation in order to determine whether section 313 of the Clean Water Act requires federal agencies to comply with Washington's water quality standards in the absence of an NPDES permit or a section 401 certification. As you know, section 313 of the Clean Water Act requires federal agencies to comply with state laws regarding water pollution "to the same extent as any nongovernmental entity[.]" 33 U.S.C. § 1323(a).

As discussed below, we believe the state does have the authority to independently enforce state water quality standards against non-federal dams located within the State of Washington outside the context of an NPDES permit or 401 certification.

RCW 90.48.080 makes it unlawful for any person to discharge any organic or inorganic matter that shall cause or tend to cause pollution of waters of the State of Washington. Pollution is broadly defined to include any

Contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or

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injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

RCW 90.48.020.

Ecology has the authority to issue enforcement orders whenever a person violates or creates a substantial potential to violate the provisions of chapter 90.48 RCW. RCW 90.48.120(1). In addition, Ecology has the authority to assess civil penalties of \$10,000 per day per violation against any person who violates the provisions of RCW 90.48.080 or other sections of chapter 90.48 RCW. RCW 90.48.144.

As you are aware, the State of Washington has promulgated water quality standards pursuant to section 303(c) of the Clean Water Act. 33 U.S.C. § 1313(c). Ecology's water quality standards, codified at chapter 173-201A WAC, are subject to EPA's review and approval and must satisfy the minimum requirements established at 40 CFR § 131.6. These minimum requirements include use designations, water quality criteria to protect the designated uses, and an anti-degradation policy. *Id.* Designated uses under Washington's water quality standards include fish migration, rearing, spawning and harvesting. *See, e.g.,* WAC 173-201A-030(1)(b)(iii). In addition, Washington's water quality standards regulate pollutants that are typically associated with hydroelectric projects. *See, e.g.,* WAC 173-201A-030(1)(c)(iii) (regulating total dissolved gas); and WAC 173-201A-030(1)(c)(iv) (regulating temperature). Finally, the state's standards include specific water quality criteria for the Snake and Columbia Rivers. WAC 173-201A-130(20), (21), (22) and (98).

A facility that violates Washington's water quality standards would also be in violation of RCW 90.48.080 because a violation of water quality standards would cause or tend to cause pollution of waters of the state of Washington. Consequently, while it is not necessary for Ecology to prove a violation of a water quality standard in order to prove a violation of RCW 90.48.080, a violation of water quality standards would clearly violate RCW 90.48.080 and would be subject to enforcement action under RCW 90.48.120 (enforcement order) and RCW 90.48.144 (civil penalty). This would include the release of water from a hydroelectric facility that violates Washington's water quality standards for temperature or dissolved gas. Moreover, any person who reduces water quality below the state's water quality standards and causes death or injury to fish, animals, vegetation or other resources of the state is liable for resource damages to the state, affected counties, and cities. RCW 90.48.142.

The Pollution Control Hearings Board ("PCHB") has upheld Ecology's authority to enforce state water quality standards. The PCHB is a quasi-judicial tribunal specifically established to review Ecology orders and penalties. RCW 43.21B.010, 43.21B.110. In *Tri-Star Marine, Inc. v. Ecology*, PCHB No. 91-249, the PCHB concluded that Tri-Star violated state water quality standards for copper, lead, zinc, aluminum, barium, iron, manganese and titanium by allowing sand blast grit to enter waters of the state of Washington. *Id.* at COL VIII. The PCHB affirmed Ecology's determination that Tri-Star's addition of metals in violation of the state's water quality standards constituted a violation of RCW 90.48.080 and

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affirmed Ecology's assessment of an \$8,000 civil penalty for Tri-Star's violation of state water quality standards. *Id.* at COL VIII and X. In addition, the attached letters indicate that Ecology as well as federal and non-federal dam operators have recognized that hydroelectric facilities must comply with state water quality standards.

Attachment A is a December 9, 1997 letter from EPA, Washington and Oregon to the Army Corps of Engineers. This letter directs the Corps to make structural improvements and modify operations at federal dams on the mainstem Columbia/Lower Snake River in order to comply with water quality standards. Attachment B is an April 1, 1999 letter from Ecology to the National Marine Fisheries Service. This letter grants a request by the Service on behalf of the federal government that Ecology approve a gas abatement and monitoring plan in order for the Army Corps of Engineers to meet Washington's water quality standards for dissolved gas at the lower four Snake River and lower four Columbia River dams. Attachment C is an April 27, 1999 letter from Ecology to the Chelan County PUD. This letter grants a request by the PUD that Ecology approve a gas abatement and monitoring plan in order for the PUD to meet Washington's water quality standards for dissolved gas at the PUD's Rocky Reach and Rock Island dams. Taken together, the three attached letters demonstrate that Washington and both federal and non-federal dam operators have all recognized that hydroelectric facilities must comply with Washington's water quality standards.

In conclusion, it is our opinion that chapter 90.48 RCW grants Ecology the authority to independently enforce state water quality standards against non-federal entities, including non-federal hydroelectric projects, located within the state. If you have any questions regarding our opinion, please do not hesitate to call me.

Very truly yours,

  
DAVID K. MEARS  
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